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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO HEADQUARTERS

BREWSTER KAHLE, INTERNET ARCHIVE, RICHARD PRELINGER, AND PRELINGER ASSOCIATES, INC., Plaintiffs, v. JOHN ASHCROFT, in his official capacity as Attorney General of the United States, Defendant.	**Case No. 04-CV-1127 MMC** **[PROPOSED] ORDER DENYING PLAINTIFFS' MOTION TO ALLOW USE OF POWERPOINT SLIDES IN HEARING ON MOTION TO DISMISS** **Date: Friday, October 29, 2004** **Time: 9:00 a.m.** **Courtroom: 7, 19th Floor**

Upon consideration of Plaintiffs' Motion to Allow Use of Slides in Hearing on Motion to Dismiss and Defendant's Opposition thereto, the Motion is hereby DENIED. In their

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Motion, Plaintiffs seek to present slides to "assist the Court" as part of their opposition to Defendant's Rule 12(b)(6) motion to dismiss at the October 29, 2004 hearing. However, Plaintiffs have not certified that the images on such slides will not introduce facts outside the well-pleaded allegations in the Amended Complaint. Plaintiffs failed to show their "slides" to Defendant's counsel before filing their motion, and they failed to attach their proposed slides to their motion, precluding the Court from reviewing them before oral argument.

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the claims stated in the complaint and assumes that the well-pleaded factual allegations are true, and Plaintiffs may not amend the allegations of their Amended Complaint in their opposition to a motion to dismiss pursuant to Rule 12(b)(6). *See*, *e.g.*, *Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1197 n.1 (9^{th} Cir. 1988). In the same vein, unlike at an evidentiary hearing, courts typically will not accept the presentation of facts not alleged in a complaint when hearing argument on a Rule 12(b)(6) motion because such a hearing is limited to a determination of the legal sufficiency of Plaintiffs' claims. Thus, Plaintiffs are not permitted to introduce evidence outside the pleadings as part of their opposition to Defendant's Rule 12(b)(6) motion to dismiss.

For all these reasons, the Court denies Plaintiffs' motion.

SO ORDERED.

Date:

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Maxine M. Chesney
United States District Judge